Supreme Court, U.S.
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No. 97-475

In The

Supreme Court of the United States

October Term, 1998

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

vs.

TSUI YUAN TSENG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

ROBERT H. SILK
Counsel for Respondent
401 Broadway
New York, NY 10013-3005
(212) 941-5964

149266

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

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BRIEF FOR RESPONDENT IN PARTIAL OPPOSITION TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Amicus Curiae United States' proposed Supplemental Brief appears to agree with respondent, and petitioner does not deny, that Montreal Protocol No. 4 would lack retroactive effect here when it goes into force 90 days after the President signs the instrument of ratification and it is deposited with the Government of Poland.

Agreeing this case had *not* arisen under the Convention as amended by Montreal Protocol but earlier, *Amicus* US posits that *if* it had,

> the amended language would leave no doubt that the Convention bars [would bar!] respondent's state-law claim for damages which . . . does not satisfy Article 17's conditions for liability.

(p.3 US Supp. Brf.) But this was not the case. The parties' rights and obligations accrued long before the amendment.

Seeking to keep the petition alive in this Court though it has lost its significance on the docket because the law governing it is about to become obsolete, *Amicus* US argues that the Court should still decide the case on the merits because there may be some other cases in which the exclusivity provision of the original Warsaw Convention is applicable. It does not quantify how many or identify such cases. It nonetheless suggests that

> a decision by the Court on the merits would have some precedential significance [and b]ecause the case has now been fully briefed, we believe it would be appropriate for the Court to give the case plenary

> consideration despite ratification of the Protocol. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of such ratification if it occurs while this case is still pending.

(p.7 US Supp. Brf.)

A better alternative would be dismissal of the writ because of the recent events. *Amicus* US has already agreed that ratification now would not affect rights accrued at a time when the unamended Convention's Article 24 limited exclusivity to those cases "covered by Article 17" (Article 24(2)). Vacatur of the judgment below and "further consideration" by the court of appeals of this case "in the light of such ratification" of the inapplicable Montreal Protocol No. 4 would be a waste of judicial resources. So too would be argument and deliberation on this case in this Court. The issues raised here are about to become academic.

This case should not be decided upon any basis other than the law as it was when the cause accrued but which will soon expire. Imaginative hypothetical events which theoretically might or might not come to pass in the future are posed by *Amicus* US to justify burdening the Court with a case likely to be the last of its kind. The Court is asked by *Amicus* US to employ its resources, not for the sake of the parties here but to set precedent for cases arising under the law of foreign states which have not ratified Montreal Protocol No. 4, an illusory task, the Court lacking sway over foreign law, and a hypothetical trickle of domestic cases which may never be brought and in any event will soon dry up. This is asked because of a recent change in the law which does not govern the controversy at hand.

Respectfully submitted,

ROBERT H. SILK
Counsel for Respondent
401 Broadway
New York, NY 10013-3005
(212) 941-5964